IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 203 of 1993

For Approval and Signature:

THE HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 of any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME-TAX - Petitioner(s)
Versus
ABHINAY FAMILY TRUST - Respondent(s)

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Appearance :
MS MM BHATT for Petitioner No(s).: 1.
MR SN SOPARKAR for Respondent No(s).: 1.

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CORAM :THE HON'BLE MR.JUSTICE D.A.MEHTA
HON'BLE MS.JUSTICE H.N.DEVANI

Date : 22/06/2005

ORAL JUDGMENT

(Per : THE HON'BLE MR.JUSTICE D.A.MEHTA)

1. The Income-tax Appellate Tribunal, Ahmedabad Bench

'B' has referred the following question under Section 256(1) of the Income-tax Act, 1961 (the Act) at the instance of the Commissioner of Income-tax:-

> "Whether, the Appellate Tribunal is right in law and on facts in directing the Income-tax Officer to treat the assessee as a specific trust and levy normal rate of tax ?"

2. Having heard the learned counsel appearing for the applicant and respondent it is apparent from the facts that the reference has been made by the Tribunal on an erroneous understanding of the factual position as the following facts go to show.

3. In the case of the respondent assessee for Assessment Year 1984-85 the Assessing Officer held that the Trust was not a specific Trust but was a discretionary Trust and levied tax at the maximum marginal rate. This order was confirmed by CIT (Appeals) and hence, the assessee carried the matter in Second Appeal before the Tribunal.

4. At the time of hearing before the Tribunal it was common ground between the parties that the issue was concluded by Tribunal's order dated 17th May, 1991

rendered in ITA Nos.1050 and 1051/Ahd/1988 in the case of Joyti Family Trust. The Tribunal has, therefore, not assigned any independent reasons while disposing of the appeal of the present assessee vide its order dated 27th January, 1992.

5. It appears that when the statement of case was drawn up in the present case order made by the Tribunal on 30th September, 1991 in the case of Jyoti Family Trust in R.A. Nos.657 & 658/Ahd/91 was pointed out wherein the Tribunal had held in case of Jyoti Family Trust that no question of law arose on the facts and circumstances of the case. However, the Tribunal on a wrong appreciation and reading of the said order has observed in paragraph No.4 of the statement of case of the present case as under:-

> "4. During the course of hearing it was brought to our notice that a statement of case has already been forwarded to the Hon'ble High Court in the case of Jyoti Family Trust in RA Nos.657 & 658/Ahd/91 dated 30.09.91."

6. In light of the aforesaid position and the statement made on behalf of the learned advocate for the respondent assessee the Court has thought it fit to

call for the original record of Income-tax Application No.118/92 in the case of C.I.T Vs. Jyoti Family Trust from the Registry of this Court. On going through the same it becomes apparent that in case of Jyoti Family Trust Tribunal had rejected reference under Section 256(1) of the Act on 30th September, 1991. The said order was challenged by way of Income Tax Application under Section 256(2) of the Act. As is apparent from the record the said application has been rejected by this Court (Coram: Their Lordships S.B.Majmudar, Acting C.J. & Y.B.Bhatt, J) vide order dated 20th April 1992. In the circumstances, the statement made by the Tribunal in paragraph No.4 that a reference has already been made in case of Jyoti Family Trust is under a mistaken belief or a wrong reading.

7. The learned advocate for the respondent – assessee has invited our attention to order dated 22nd September, 1995 whereby Hon'ble Supreme Court of India has, after condoning delay, dismissed Special Leave Petition filed by CIT in case of Jyoti Family Trust. As can be seen from the certified copy of the

order in Petition for Special Leave to Appeal (Civil) No.3685 of 1993 it is further stated that the same arises from the judgement and order dated 20th April, 1992 of the High Court of Gujarat in ITA No.118 of 1992.

8. In the circumstances, on facts, no reference has been made in case of Jyoti Family Trust, and the Tribunal, in the present case having not assigned any independent reasons while disposing of the appeal, was not required to make any reference in fact. The reference having been made under an erroneous impression is not required to be answered and is, therefore, returned unanswered in the aforesaid fact situation.

9. The reference stands disposed of accordingly. There shall be no order as to costs.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

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Bhavesh